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No. 92-1224

In the Supreme Court
OF THE
United States

OCTOBER TERM 1992

NINTENDO OF AMERICA, INC.,
Petitioner,

vs.

LEWIS GALOOB TOYS, INC.,
Respondent.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in concluding that a consumer using the Game Genie together with a Nintendo Entertainment System ("NES") and compatible video game for private, in-home entertainment does not create infringing derivative works (and thus that Respondent Lewis Galoob Toys, Inc. ("Galoob")[1] is not a contributory infringer) in light of the District Court's factual findings after trial that the Game Genie (1) does not alter or permit the user to alter the contents of any "game cartridge" embodying a Nintendo video game; (2) does not temporarily or permanently copy any of Nintendo's computer programs or images; (3) does not store or generate any images of its own; and (4) must be used with Nintendo's system and a game compatible with it, and cannot substitute for any work copyrighted by Nintendo?

2. Did the Court of Appeals err in affirming the District Court's finding that the altered video game play the Game Genie permits game owners to enjoy is a "fair use" in light of the District Court's factual findings after trial that (1) the Game Genie is used privately, at home, for non-profit personal entertainment purposes; (2) Nintendo has voluntarily and profitably published its works to the public; (3) purchasers of Nintendo's video games are entitled to display the games' sounds and images in their entirety; and (4) there is no actual or reasonably foreseeable market for altered versions of Nintendo games, but only for a separate hardware device that operates in conjunction with Nintendo's system and is beyond the scope of Nintendo's

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[1]All parties who appeared below are listed in the above caption. Pursuant to Rule 29.1, Respondent represents that it has no parent company. Respondent owns a one-third interest in Galoob Toys Canada, Inc., an Ontario corporation, and has no other affiliates or subsidiaries that are not wholly-owned.

copyright monopoly?[2]

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[2]In addition to the two grounds on which the District Court resolved this case and the Court of Appeals affirmed it, Respondent presented four other grounds in the District Court and the Court of Appeals, each independently sufficient to ground the judgment now standing in its favor. If this Court decided to review the judgment herein and did not affirm on either ground set out in the text, it would be necessary for it to remand to the lower courts for their determination of those issues. *See, e.g., United States v. Ballard*, 322 U.S. 78, 88 (1944). The issues are:

1. Section 117 of the Copyright Act, amended by Congress in 1980, allows the rightful owners of computer software (such as consumers who buy video games) to make "adaptations" of that software for their own use. This legislation authorizes software owners to add to or alter the software they have bought to enhance its utility to them. Galoob showed at trial that this is precisely what the Game Genie does: Without copying or appropriating in any way any portion of Nintendo's computer programs or the images they generate, the Game Genie interacts with the Nintendo computer and temporarily adapts the execution of the video game program for players' personal enjoyment. *See* Gal. Ct. App. Br. at 39-48.

2. This Court held in *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), that the seller of a device marketed to the public is liable for contributory copyright infringement only upon proof that the device has *no* "substantial non-infringing uses." *See id.* at 442. Galoob showed at trial, and the District Court expressly found, that "[t]he vast majority of the Game Genie codes alter the rules . . . or method of play" of Nintendo's video games. Pet. App. B-11. Under long-established principles, these rules or methods of game play are merely "ideas" that are not protectible by copyright. Because the consumers who have bought and paid for their Nintendo games have every right to exhibit the sounds and images they contain, the alterations to unprotected rules and methods of play that the Game Genie allows them temporarily to effect during play infringe no right of Nintendo. *See* Gal. Ct. App. Br. at 17-23. These are substantial non-infringing uses of the Game Genie that, in and of themselves, defeat Nintendo's infringement claim. *See id.* at 37-38.

3. Galoob also showed that other occasional Game Genie effects, such as "freeze-ups," color changes, screen scrambles and the like, lack the originality constitutionally and statutorily necessary to make altered game play a "derivative work." These effects also are substantial non-infringing uses that independently preclude Nintendo's claims under *Sony*. *See* Gal. Ct. App. Br. at 23-26, 37-38.

(continued...)

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[2](...continued)

4. *Sony* also holds that when a mass-marketed device might be used to infringe works whose copyrights are held by third parties, no single copyright holder may maintain an action for contributory infringement against the device's manufacturer "unless the relief that he seeks affects only his programs, or unless he speaks for virtually *all* copyright holders with an interest in the outcome." 464 U.S. at 446 (emphasis added). The District Court found that hundreds of games that can be used on the Nintendo Entertainment System have been produced by 71 third parties. Pet. App. B-6. Those third parties hold the copyrights in those games, and they were not before the District Court. Although the Game Genie can function in combination with *any* of these third-party games, Nintendo showed that only *seven* of the 71 third-party producers joined it in objecting to the use of the Game Genie with their games. *See id.* at B-8; Gal. Ct. App. Br. at 38-39. This fact is independently fatal to Nintendo's infringement claims as well.

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STATEMENT OF THE CASE

In this case, Petitioner claims that when owners of a Nintendo Entertainment System and copyrighted video games designed for use on that system play their games in the privacy of their homes in conjunction with Respondent's "Game Genie," they infringe Nintendo's copyright in the game. Petitioner thus asserts that by manufacturing and selling the Game Genie, Respondent is guilty of

contributory infringement. After trial, the District Court rejected Petitioner's claim on the facts and the law (Pet. App. B), and the Court of Appeals affirmed. Pet. App. A.[3]

Galoob's Game Genie is a hardware device designed for private family use in the home in conjunction with the NES. The Game Genie has no utility without an NES and a game that can be played on that system: A player *must* have an NES *and* a compatible game cartridge in order to play with the Game Genie, and the Game Genie *cannot* be used unless it is at all times physically attached to a game cartridge and inserted into the NES "control deck." CR 192 ¶19; 4/30 RT 60 (Jodel); Ex. G-408 ¶10 (Small). It is undisputed that the Game Genie itself neither contains nor generates any computer code, visual images or other material copyrighted by Nintendo. *See, e.g.*, Ex. G-412 ¶42 (Beck); 4/29 RT 6-7, 69-70 (Small); Ex. G-411 ¶¶101-108 (Nichols).

The Game Genie is a plastic housing slightly larger than an audio cassette tape with a connector pin array at one end and a socket at the other. It contains an integrated circuit and a small read-only memory ("ROM").[4] One end of the device connects to the video game cartridge, and the other plugs into the slot in the NES "control deck" that ordinarily receives the game cartridge.

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[3] In its haste to characterize the lower courts' decisions in this case as "novel," "unprecedented" and a "blanket immunization" of innumerable forms of infringing behavior, Petitioner has omitted from its Statement a great deal of the unique and technologically complex factual detail pertinent to the lower courts' analysis and conclusions. The following discussion, as explained and expanded in argument, remedies that omission.

[4] "Read-only memory" is so denominated because the computer can only "read" the data or instructions imprinted on it. Like a phonograph record, the information imprinted on a ROM can be "read" (as the record can be played), but it cannot be altered. Ex. G-411 ¶96 (Nichols); 4/29 RT 6-7 (Small); 4/29 RT 136-37, 153 (Nichols).

The Game Genie operates in two "modes:" "set-up mode" and "play mode." When a game cartridge with the Game Genie attached is inserted into the control deck and the power is turned on, a small computer program in the Game Genie's ROM causes the player's television set to display the Game Genie's "set-up mode." CR 192 ¶21.

In "set-up mode," the television prominently displays the name "GAME GENIE" at the top of the screen, beneath which appear two rows of letters. By manipulating the buttons on the NES "controller," players can select up to three sequences of either six or eight letters each. These letter sequences are called "codes." When players have selected the codes they wish, they press the "start" button on the NES controller to start the game. CR 192 ¶22; Exs. J-201 at 7-10, G-476; Ex. G-408 ¶11 (Small).

Starting the game initiates the Game Genie's "play mode." During "play mode," the player plays the game for the most part exactly as it would be played without the Game Genie, but game play may be enhanced in up to three respects corresponding to the "codes" the player has selected. If the player has chosen not to select any codes during "set-up mode," the game plays precisely as it would if the Game Genie were not attached to the game cartridge at all. CR 192 ¶22; Ex. G-408 ¶11 (Small). If the game cartridge is detached from the Game Genie at any time during its operation, all game play sounds and images from the television cease instantly. CR 192 ¶20. At no time during game play with the Game Genie are the contents of the game cartridge altered in any respect. Ex. G-412 ¶42 (Beck); 4/29 RT 69-70 (Small); Ex. G-411 ¶¶101-108 (Nichols).

The Game Genie comes with a printed "Programming Manual and Codebook" (the "Codebook"), which at the time of trial described Game Genie codes that could be used to enhance game play in 179 video games, including 25 to which Nintendo held the copyrights. CR 192 ¶¶12, 17; Ex. J-201 (Game Index). Of the roughly 1650 codes the Codebook listed, about 235 operated on games to which Nintendo held copyrights. Pet. App. B-11; Ex. J-201; CR

192 ¶12. The majority of listed Game Genie codes allow increases or decreases in the amount of time, "lives," or other chances to play; increases or decreases in the amount or potency of a character's weapons or powers; or changes in the point at which the player begins the game. Pet. App. B-11; Ex. G-412 ¶¶36, 39-40 (Beck); Ex. G-415 ¶24 (Nauert); 4/30 RT 113-14 (Beck); Exs. G-484, G-492.

Each of the codes the player enters is interpreted by the Game Genie to refer to a particular "address" in that portion of the video game cartridge's read-only memory that holds the computer program that generates the game (the "Program ROM"). These addresses contain data for use by the NES control deck's computer, or central processing unit ("CPU"), during game play. Physically and electronically, the Game Genie stands between the CPU and the Program ROM. As the game begins and is played, the CPU's inquiries directed to the Program ROM pass through the Game Genie, and the Game Genie "reads" them as they go by. If an inquiry is directed to an "address" that matches one of the three or fewer codes the player entered during "set-up mode," the Game Genie intercepts that inquiry and responds with the data that the relevant code dictates for that address in the Program ROM. If an inquiry is directed to an address that does not match one of those codes, the Game Genie does nothing. Ex. G-411 ¶¶103-104, 108, 110 (Nichols); 4/29 RT 145-47, 152, 154 (Nichols); Ex. G-475.[5]

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[5]For example, at the beginning of the game "Gumshoe," Nintendo's CPU asks the Program ROM (among a great many other things) how many "lives" the private eye, Stevenson, starts with by asking the Program ROM for the number it has stored at the address corresponding to initial number of lives. Without the Game Genie, the Program ROM would allot three lives to Stevenson by responding that it found the number "three" at the relevant address. If the player used the Game Genie and entered a code designed to start Stevenson with six lives, when the CPU asked the Program ROM for the number at the address corresponding to Stevenson's initial number of lives, the Game Genie would catch the inquiry to an address it was looking for, and respond to

(continued...)

As noted above, the Game Genie accepts a maximum of three codes per play, allowing it to modify no more than *three* out of the hundreds of thousands or millions of parameters affecting game play in any one play of the entire game. Thus, as the District Court expressly found, out of the million or so inquiries *per second* that the CPU is directing to the Program ROM in the Nintendo game cartridge, the Game Genie responds to only very few. Pet. App. B-10 n.2.

Because Nintendo's computer programs, sounds and graphic images are stored in the game cartridge in "read-only" memories, the Game Genie does not alter or permit the user to alter the contents of the game cartridge. The Game Genie also does not temporarily or permanently copy any of Nintendo's computer programs or images. Nor does the Game Genie itself store or generate any images of its own. Ex. G-412 ¶42 (Beck); 4/29 RT 6-7, 69-70 (Small); Ex. G-411 ¶¶101-108 (Nichols).

On the basis of the evidence at trial, the District Court found that the "Game Genie codes cannot change the plot, theme, or characters of any game." Pet. App. B-11. The Game Genie cannot create or permit the user to create a new "level" or "world" in the game. It cannot change the object of the game. Nor can it create or permit the user to create a new game character, adversary, weapon, obstacle,

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[5](...continued)
the CPU's inquiry with "six" instead of "three." The CPU would then understand that Stevenson started with six lives (rather than three), and control game play accordingly.

This response would not change the number of bullets that Stevenson begins with, the number of points Stevenson gets for overcoming a particular enemy, or the place in the world of the game that play begins, each of which corresponds to one or more values stored at other addresses in the Program ROM. An appropriate Game Genie code might direct the Game Genie to catch inquiries to those addresses and respond with some value other than the one that is found in the Program ROM, giving the player more bullets, fewer points, or an advanced start as the code allowed.

scene or landscape.[6] Shirk Dep. 82:18 to 83:15, 89:12 to 90:5; Ex. G-411 ¶114 (Nichols); 4/29 RT 147-48 (Nichols); Ex. G-412 ¶¶39-41 (Beck); 4/29 RT 6-7 (Small).

Finally, as already noted, the Game Genie cannot be used to play anything unless a game cartridge is also used; it is no substitute for purchasing a Nintendo game. Unless a game cartridge is inserted in the control deck during the entire time the game is being played, no images will appear on the television screen. If the game cartridge is disconnected from the Game Genie at any time during play, all game play sounds and images cease instantly. CR 192 ¶¶19-20; 4/30 RT 60 (Jodel); Ex. G-408 ¶10 (Small).

On these facts and others discussed below, the District Court found that a family's private home use of the Game Genie does not create "derivative works" under the Copyright Act; and that even if it did, that use would be a "fair use" and therefore noninfringing. Accordingly, the court found, Galoob committed no contributory infringement in marketing the device. Pet. App. B. The United States Court of Appeals for the Ninth Circuit affirmed on both of these alternative grounds. Pet. App. A.

REASONS FOR DENYING THE WRIT

Several introductory points are critical to an evaluation of Nintendo's Petition:

First, Nintendo's claim is for *contributory* infringement. This means that under *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), Nintendo must show that when a purchaser of an NES and game cartridge play a

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[6] For example, the game "Kid Icarus" has an action figure named "Pit" that is controlled by the player, and 45 adversaries and obstacles that try to defeat him. The Game Genie may allow a player to alter the number of chances to win before the game ends, the level of weapons or power, the starting position of play, or the rate of advancement through the game, but cannot create a companion for Pit, or any other action figure, friend or foe. Nor can it create new weapons for Pit to use, new worlds for Pit to explore, or new quests for Pit to undertake.

game using the Game Genie, that *purchaser* infringes Nintendo's game copyright. *Id.* at 449. In short, under *Sony* it is the *purchaser's* use of the Nintendo game cartridge together with the Game Genie that must be evaluated to determine whether Galoob is a *contributory* infringer.[7]

Second, it has never been disputed that the owner of a Nintendo game cartridge has the right to use it by playing the game on an NES and displaying its images on a home television screen. As the District Court observed, "[t]he alleged infringer . . . is not a commercial licensee, but rather a consumer utilizing the Game Genie for noncommercial, private enjoyment." Pet. App. B-15. Nintendo's unappetizing theory of infringement is that by playing the game in any way differently from the way Nintendo dictates—such as by endowing a game's action character with an additional "life," or starting at the fourth "level" of a game instead of at its beginning—its customer becomes a copyright infringer.

Third, as noted, the Game Genie cannot be used as an alternative to the purchase of a Nintendo game cartridge. To play "Super Mario Brothers" with or without the additional features and flexibility the Game Genie permits, a player *must* possess the game cartridge and an NES to play it on.

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[7]The Petition makes a few scattered references to the statutory right to "authorize" the creation of derivative works, but nowhere asserts that this right is at issue in this case. In fact, it is not: Though Petitioner did attempt to raise such a theory at the eleventh hour, the District Court excluded it. The Court of Appeals agreed that the "authorization" issue was not before it, observing that "Nintendo's complaint does not allege direct infringement [by 'authorization'] nor did it try the case on that theory." Pet. App. A-11. Petitioner's wise decision to exclude this precluded theory from its Questions Presented and argument in its Petition forecloses any further discussion of the issue in this Court. *See* SUP. CT. R. 14.1(a); *Irvine v. California*, 347 U.S. 128, 129-30 (1954). Respondent accordingly refrains from addressing it.

Fourth, also as noted above, the Game Genie does not ever contain or copy any part of Nintendo's copyrighted computer programs. Nor does it ever store, even temporarily, the sounds or visual images produced by a copyrighted game, or for that matter by the interaction between the Game Genie and a game. What a player produces using the Game Genie flashes momentarily across the television screen and is gone. It is not recorded or copied anywhere. As the District Court found, "[s]uch use neither generates a fixed transferable copy of the work, nor exhibits or performs the work for commercial gain." *Id.* at B-15.

I.

THE NINTH CIRCUIT'S LIMITED DETERMINATION THAT A PLAYER DOES NOT CREATE A "DERIVATIVE WORK" WHEN PLAYING A NINTENDO GAME WITH THE GAME GENIE IS CORRECT, AND IN ANY EVENT PRESENTS NO ISSUE MERITING REVIEW.

The Ninth Circuit's holding is narrow: "A derivative work must incorporate a protected work in *some* concrete or permanent 'form.'" Pet. App. A-4 (emphasis added). It explained:

> "The Game Genie merely enhances the audiovisual displays (or underlying data bytes) that originate in Nintendo game cartridges. The altered displays do not incorporate a portion of a copyrighted work in some concrete or permanent *form*. Nintendo argues that the Game Genie's displays are as fixed in the hardware and software used to create them as Nintendo's original displays. Nintendo's argument ignores the fact that the Game Genie cannot produce an audiovisual display; the underlying display must be produced by a Nintendo Entertainment System and game cartridge. . . . [Game play resulting from use of the Game Genie together with an NES and a Nintendo game

cartridge] cannot be a derivative work." (Pet. App. A-6-7 (emphasis in original))

A. The Court Of Appeals' Analysis And Conclusions Are Consistent With Both The Copyright Act And Common Sense.

To begin with, the Ninth Circuit's approach is not "contrary to the express provisions of the Copyright Act" as Nintendo asserts. Pet. at 9. Contrary to Nintendo, the Ninth Circuit's opinion does *not* specify or restrict the "form" in which the alleged derivative work must be embodied; it merely requires that it be in "*some*" form. Pet. App. A-4 (emphasis added). This is fully consistent with the Copyright Act, which states that an alteration of a copyrighted work may be a "derivative work" regardless of the "form in which a work may be recast, transformed or adapted," and with the statutory definition of "audiovisual works" on which Nintendo relies, which also contemplates that such works will be "embodied" in "material objects" "regardless of the[ir] nature . . . ." 17 U.S.C. §101.[8]

Yet Nintendo repeatedly claims that the Court of Appeals "immunize[d] certain derivative works from infringement liability solely because of the *manner of their embodiment.*" *E.g.*, Pet. at 14 (emphasis added). That simply is not what the Ninth Circuit did. The focus of the Ninth Circuit's conclusions is not on the "manner" in which

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[8]The evanescent images that flash by on the television screen as a computer game is played—which are not stored or embodied either in computer memory, on a videotape, or in any other place—obviously do not qualify as a "form" in which the altered game play could be "embodied" within the statute's terms. As Congress noted, "the definition of 'fixation' would exclude from the concept purely evanescent or transient reproductions such as those projected briefly on a screen, shown electronically on a television or other cathode ray tube, or captured momentarily in the 'memory' of a computer." H.R. REP. NO. 1476, 94th Cong., 2d Sess. 53 (1976), *reprinted in* 1976 U.S.C.C.A.N 5659, 5666; *see also* 1 M. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT §2.03[B][2], at 2-30 (1992); 2 NIMMER §8.02[B][2], at 8-28 to 8-28.1.

a purported derivative work is "embodi[ed]," but whether the purported derivative work is separately "embodi[ed]" at all.

As the above-quoted passage shows, the Ninth Circuit applied the simple rule that devices that allow enhanced or altered viewing of copyrighted images do not create infringing derivative works unless they "physically incorporate" the original work (*see* Pet. App. A-5, 7), or copy it in a separately embodied physical form. Applying that rule in this case, the Court of Appeals' decision focused explicitly on the record facts and findings as to what the Game Genie does and how it does it to conclude, correctly, that the Game Genie simply effects temporary enhancements in the transitory images Nintendo's hardware and software produce, without creating any separate audiovisual work that is ever embodied in *any* physical form.[9]

Nintendo makes the same mistake in its repeated claim that the Ninth Circuit's decision has "created a judicial exception to [the derivative works] right with respect to computer media." *E.g.*, Pet. at 8; *see also id.* at ii, 14. Again, that is neither what the opinion says nor what it does. The Court of Appeals went to considerable lengths to explain its analysis in terms of simple, commonplace, *non*-digital mechanisms that show the result in this case to be both obviously correct and entirely independent of the technology at issue.

The Court of Appeals tendered the specific examples of "lenses that merely enable[ ] users to view several [copyrighted] artworks simultaneously" and "kaleidoscopes . . .

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[9] Nintendo's argument that the Ninth Circuit has "resurrected" the "long-discredited rule" of *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1 (1908) (*see* Pet. at 13 n.11) flogs the same straw man. Nintendo notwithstanding, the Court of Appeals did *not* require embodiment in a "*particular* physical form" (*id.*)—such as sheet music as opposed to piano rolls (the distinction held material in the case Nintendo criticizes)—but only that the derivative work must be embodied in "*some* concrete or permanent 'form.'" Pet. App. A-6 (emphasis added).

pointed at protected artwork." Although such devices create a transitory image based on but different from the original copyrighted image, they neither physically appropriate nor copy the images that they alter or enhance. Thus a person who uses them does not infringe, and a person who sells them is not a contributory infringer. *See* Pet. App. A-7-8.

As the Court of Appeals observed, the Game Genie is precisely analogous: Just as the Court of Appeals' "lenses" neither alter the protected "artworks" viewed through them nor physically embody the altered image, it was established at trial (and is undisputed) that the Game Genie does not and cannot change the game cartridge or its copyrighted contents, nor can it store or create any independently embodied version of a game. This is the defect in Nintendo's argument that a game cartridge and a Game Genie together illegally embody an infringing derivative work: A game cartridge plus a Game Genie no more "embodies" a "derivative work" in "some concrete or permanent form" than does a kaleidoscope plus a painting. In short, both lower courts correctly limited infringement liability to situations where something protectible is actually *taken* or *copied*, and equally correctly concluded that this is not such a case.

A moment's reflection discloses the tremendous mischief any different rule would entail. The Ninth Circuit properly recognized that the Game Genie is simply a hardware tool that, like innumerable others commonly enjoyed in households throughout the United States, may be used together with copyrighted works to alter the sounds and images those works can generate in endless ways that no one could seriously contend violate federal copyright law. These devices use electronic technology (analogous to the optical technology of the Court of Appeals' "lenses" and "kaleidoscopes") to alter the audio or visual performance or display of copyrighted materials without ever appropriating or copying the copyrighted work.

For example, nearly all videocassette and video laser disc players have fast-forward, slow-motion and freeze-frame features that are hard-wired into the device. Among other things, a viewer can skip, repeat or rearrange scenes; freeze the picture; or play the action at fast speed or in slow motion. Examples can be multiplied, from the volume, tone and color controls on an ordinary television receiver to the compact disc player and the myriad of home audio sound processing units.[10]

All of these hardware devices use electronic technology to alter the audio output, or the visual output, or the order of performance, of copyrighted materials—often in very significant ways that can altogether "transform" or "recast" the work being performed or displayed in the consumer's home. Nintendo cannot distinguish these devices from the Game Genie: If the altered audiovisual display generated by use of the Game Genie is a derivative work, then so are all of the altered audiovisual outputs of all of these widely-used hardware devices. Nintendo's unprecedented theory would make infringers of nearly every consumer in America, and contributory infringers of the devices' manufacturers and distributors.

Fortunately, as the Court of Appeals recognized, Nintendo is wrong. The reason is simple: None of these widespread hardware devices creates infringing "derivative

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[10]Users can "program" most compact disc players to omit particular "tracks," and to rearrange the order in which the tracks are played. Many machines hold several compact discs and allow the user to select tracks from different discs as well as the order in which the various selections are played. Even more dramatic are sound processing devices readily available for home use. Equalizers, for example, are sophisticated versions of "tone controls" that allow a listener to increase or decrease the volume in discrete frequency ranges. Other devices allow a user to create the electronic illusion that the listener's living room is a symphony hall, a rock auditorium or a cathedral. Use of these devices materially alters the performance of the original copyrighted recording, though not the recording itself. Under Nintendo's analysis here, all of these would produce infringing derivative works, even though none ever copies or appropriates the protected works on which they act.

works" because, just like the "lenses" and "kaleidoscopes" to which the Court of Appeals referred, the audiovisual effects they produce are merely transitory enhancements or alterations that neither physically appropriate nor copy the original sounds and images in any separately "embodied" "form." Just as a kaleidoscope needs an extraneous image, and does not store or generate one of its own; just as a VCR needs a videocassette, and neither stores nor generates any image without one; so too the Game Genie *must* interact with a Nintendo game system.

As the Ninth Circuit explicitly recognized, the Game Genie alone neither stores nor generates any sound or image, though it can cause transitory alterations of some aspects of the images that a game cartridge contains and generates itself. *See, e.g.*, Pet. App. A-6-7. The Game Genie no more creates infringing derivative works than do the innocuous electronic and physical devices to which the Ninth Circuit correctly analogized it.[11] The Court of

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[11]Of equal concern, hundreds of thousands of computer users would violate the Copyright Act every day by continuing to use the hundreds if not thousands of popular software products that adapt and alter the copyrighted visual displays of other computer programs to enhance their usefulness. Examples include word processing aids (such as spelling, grammar and citation checkers, dictionaries, and thesauruses); document controls (to keep track of and quickly access files and information); and any number of other "user interfaces" that are designed to be used together with other copyrighted computer software, and thus raise the same issue Nintendo does here. As the testimony below revealed, one of the most significant trends in the computer industry has been the increasing ability of desktop machines to operate several complicated applications software programs simultaneously ("multi-tasking"), and for such software to work cooperatively to gather and analyze data, share the interim results of such analysis with one another, and communicate the results with the user. Ex. G-412 ¶¶43-44 (Beck); 4/30 RT 128-38 (Beck). However, if Nintendo's view were to prevail, the vast potential of such cooperative and useful software would be effectively stymied. The Ninth Circuit fully appreciated the asphyxiating effect on innovation and development that Nintendo's unprecedented approach would impose:

(continued...)

Appeals thus correctly applied the governing law and the facts as found by the District Court in rejecting Nintendo's theory.

Indeed, the examples Nintendo tenders in its Petition confirm the wisdom of the Court of Appeals' analysis. For example, Nintendo compares the Game Genie to the recently released recording of Natalie Cole singing a "duet" with her late father, Nat King Cole. Nintendo states, correctly, that when she

> "overdubbed her voice onto her father's version [of the song 'Unforgettable'], she created a derivative work that changed the form of the original work, regardless of the physical objects in which that new work might be embodied." (Pet. at 12-13)

But Ms. Cole's new "duet" *was* embodied in "some form"—namely, the tape recordings and compact disks marketed to the public. The analogy to use of the Game Genie utterly fails because, as the District Court found, and the Court of Appeals affirmed, the altered game play that the Game Genie allows game owners to enjoy does *not* incorporate the protected work in *any* "concrete or permanent 'form.'" Pet. App. A-4; *see also id.* at A-6.[12]

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[11](...continued)

> "In holding that the audiovisual displays created by the Game Genie are not derivative works, we recognize that technology often advances by improvement rather than replacement. Some time ago, for example, computer companies began marketing spell-checkers that operate within existing word processors by signalling the writer when a word is misspelled. These applications, as well as countless others, could not be produced and marketed if courts were to conclude that the word processor and spell-checker combination is a derivative work based on the word processor alone." (Pet. App. A-9 (citation omitted))

[12]Likewise, the example given by Nintendo (Pet. at 14) of the creation of a new computer program incorporating elements of the original Nintendo work together with the Game Genie's alterations "and

(continued...)

The distinction is fundamental: Suppose that Natalie Cole had put a recording of her father singing "Unforgettable" on her home phonograph and, in the privacy of her living room, had merely sung along with the record, creating the identical "duet" that she commercially recorded. The result would not differ, of course, if Ms. Cole sang into a microphone attached to her home stereo, so that her voice and her father's both emanated from the system's speakers. Nintendo's argument notwithstanding, in both examples Ms. Cole's private performance would not be an infringing derivative work, and the microphone manufacturer would not be a contributory infringer, even though the musical performance that resulted would have differed substantially from Mr. Cole's original recording.

"No license is required by the Copyright Act . . . to sing a copyrighted lyric in the shower." *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 155 (1975). Presumably even Nintendo would agree that a private performance in the shower stall does not infringe as long as the copyrighted song is sung without alteration. But under Nintendo's unprecedented view of the derivative works right, a shower singer's creative or inadvertent departures from the original tune or lyrics would create an infringing "derivative work" even though the revised song is sung only in the privacy of the singer's home, and no recording is made for later sale or exhibition. Similarly, a parent who reads a copyrighted bedtime story to a child, and deletes a scary passage or

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[12](...continued)
embodying this program in a single game cartridge" undoubtedly would be a derivative work because, by the very terms of the hypothetical, the altered work would be embodied in "some concrete or permanent form"—namely, the new game cartridge. Such a cartridge could be produced and sold to customers in lieu of the existing Nintendo game cartridge embodying the copyrighted work, as also would be the case if, for example, a player made a videotape recording of game play altered by the Game Genie, which could be sold or distributed to others. But neither of those is this case, in which *no* such separate concrete embodiment of the offending game play is *ever* created.

embellishes the tale, would also infringe the copyright, even though no lasting copy of the altered reading was created, sold, or publicly exhibited, and even though a private reading of the work without any deletions or changes plainly would *not* infringe under the statute's plain terms. No court has *ever* found such innocent *private* activities to be acts of infringement, and no court should, so long as the song or story—whether revised or unaltered—remains private and is not recorded or otherwise "embodied" in "some concrete or permanent form."[13]

In short, the District Court correctly recognized that

> "[t]he Game Genie is a tool by which the consumer may temporarily modify the way in which to play a video game, legally obtained at market price. Any modification is for the consumer's own enjoyment in the privacy of the home. Such a process is analogous in purpose, if not in technology, to skipping portions of a book, learning to speed read, fast-forwarding a video tape one has purchased in order to skip portions one chooses not to see, or using slow motion for the opposite reasons. None of these practices permanently modifies or alters the original work, none produces a separate work which can then be transferred in any way, none replaces the original work, and none deprives

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[13]The *public* display of images produced by the Game Genie would be a different case, which the District Court expressly found was not presented here. Pet. App. B-15 n.4. A modification of an existing copyrighted work that is publicly exhibited may well infringe the *public performance* or *display* rights of 17 U.S.C. Sections 106(4) and (5) even though no "fixed" copy is created. "Thus 'a ballet, pantomime, or improvised performance[] may be an infringement even though nothing is ever fixed in tangible form.'" 2 NIMMER §8.09[A], at 8-114 n.4 (quoting H.R. REP. NO. 1476, *supra*, at 62). On these principles, a child's improvised emulation of a copyrighted ballet danced in the privacy of her bedroom is not an act of infringement, though it would be were the dance performed publicly.

the copyright holder of current or expected revenue." (Pet. App. B-16)

B. The Court Of Appeals' Decision Does Not Conflict With The Settled Law Of Any Other Circuit, Or Otherwise Merit This Court's Review.

Nintendo is unable to suggest any plausible reason why the Ninth Circuit's narrow holding merits review here. Although Nintendo sweepingly asserts that it "undermines the rights of a broad class of copyright owners extending far beyond the video game industry" (Pet. at 14), it provides no example of an application of the Ninth Circuit's analysis that should give any pause; indeed, as explained above, it is a rule contrary to the one the Ninth Circuit adopted here that would have far-reaching and deeply dangerous consequences.

Nor does the decision below conflict with a decision of any other Court of Appeals as Nintendo claims. *Midway Mfg. Co. v. Artic Int'l, Inc.*, 704 F.2d 1009 (7th Cir.), *cert. denied*, 464 U.S. 823 (1983), holds that a copyrighted video game that is altered *can* be a derivative work—a proposition that the Ninth Circuit's decision in no way disputes. But the *Midway* decision does not even address the issue of whether, as the Ninth Circuit concluded, that altered work must "incorporate a protected work in some concrete or permanent 'form'" in order to infringe. Pet. App. A-4.

The Seventh Circuit had no occasion to consider that issue in *Midway*. In *Midway*, the defendant marketed a computer chip that could be inserted into plaintiff's copyrighted video game machine to speed up the rate of play. But, as the Ninth Circuit explained, the defendant's "chip substantially copied and *replaced* the chip that was originally distributed by" the plaintiff. Pet. App. A-8 (emphasis in original); *see also Midway Mfg. Co. v. Artic Int'l, Inc.*, 547 F. Supp. 999, 1004 (N.D. Ill. 1982) (district court opinion finding that this was a "clear case of copying" Midway's software). By contrast, the Game Genie contains *no* copyrighted Nintendo software. *See* Pet. App. B-11.

In short, the Ninth Circuit reached the correct result with a decision that neither conflicts with any decision of any Court of Appeals nor presents an issue of overriding concern meriting review here.

II.

THE COURT OF APPEALS' ALTERNATIVE HOLDING THAT A PLAYER'S PRIVATE HOME USE OF THE GAME GENIE IS A "FAIR USE" IS CORRECT AND DOES NOT MERIT REVIEW.

Both the District Court and the Court of Appeals also held that even if private home use of the Game Genie produced a derivative work, it would be a "fair use." That determination was correct, does not conflict with any decision of this Court or another Court of Appeals, and does not merit review here.

Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417 (1984)—the only pronouncement by this Court on fair use in the contributory infringement context—involved facts analogous to those here. In *Sony*, holders of copyrights in certain television programs sued the manufacturer of the Betamax video tape recorder for contributory infringement. Those copyright holders sought to enjoin Sony from manufacturing and selling that electronic device, claiming that its purchasers were using it to infringe their copyrights. One use of the device was recording unauthorized copies of copyrighted television programs to "time-shift" on-the-air broadcasts into hours better suiting the viewer's convenience. The Court found that consumers' use of Sony's product for time-shifting purposes to be a "fair use" of the copyrighted programs.

Under *Sony*, the fair use issue in a contributory infringement case turns *exclusively* on whether the *consumer's* use of the copyrighted material constitutes a fair use. 464 U.S. at 449. Fair use is a privilege against a direct infringement claim (17 U.S.C. §107), and thus is a privilege held in the first instance by the alleged direct infringers—in

this case, by consumers playing their video games at home. Just as application of the fair use doctrine in *Sony* resulted in substantial economic gain for Sony as well as other VCR manufacturers, the fair use doctrine here will ultimately redound to Galoob's commercial benefit as well. But *Sony* makes clear that it is the fairness of the *consumer's* use of its video game, not some evaluation of the commercial "fairness" of Galoob's product, that governs the analysis.

In examining the fairness of the consumer's use, the Court will be guided by Section 107 of the Copyright Act (17 U.S.C. §107), through which Congress codified the common law doctrine of fair use in 1976. Section 107 enumerates four non-exclusive factors to be considered in assessing fair use.[14] H.R. REP. NO. 1476, *supra*, at 66. We consider each of these factors in turn.

Contrary to Nintendo, both the District Court and the Court of Appeals applied the standing decisions of this Court impeccably to each of the four statutory factors, which Nintendo neglects to discuss in any organized fashion in its Petition. Nintendo's blanket assertion that the Court of Appeals failed to consider the purportedly unique aspect of the derivative works right at issue in this case is belied by that court's explicit reasoning. It is the Petition that fails to address something critical—the factual findings the District Court made after trial that render Nintendo's position untenable.[15]

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[14]As *Sony* makes clear (464 U.S. at 448 & n.31), Section 107 was merely "intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way." H.R. REP. NO. 1476, *supra*, at 66. Congress had "no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change." *Id.*

[15]As Nintendo obliquely concedes, the fairness of a use is an intensively fact-bound question; the appellate court applies the legal standard after "the district court has found facts sufficient to evaluate each of the statutory factors . . . ." Pet. at 17 n.12 (quoting *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985)).

A. The First Factor: A Consumer's "Non-Commercial" Home Use Of Its Video Games Creates A Presumption Of Fair Use.

The first factor in evaluating fair use is "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes." 17 U.S.C. §107(1). If the consumer undertook a commercial or profit-making use of the copyrighted work, that use would be presumptively unfair. *Sony*, 464 U.S. at 449. "The contrary presumption [was] appropriate" in *Sony*, however, because "time-shifting for private home use must be characterized as a noncommercial, nonprofit activity." *Id.* Likewise, a consumer's use of a Game Genie for private home enjoyment is a non-commercial, nonprofit activity. Game owners are simply playing the games they have purchased for their own private enjoyment, not exploiting the games in some commercial venture. Accordingly, the courts below properly held that the "first factor therefore establishes a presumption of fair use, which could be overcome only by Nintendo's direct proof of injury." Pet. App. B-20; *see* Pet. App. A-12.

Nintendo responds that private home use is "commercial" because Game Genie users are varying the play of Nintendo games without paying any compensation to Nintendo. Pet. at 20, 22-23. This argument disregards this Court's express holding in *Sony*: "private home use must be characterized as a noncommercial, nonprofit activity." 464 U.S. at 449.[16] Moreover, Nintendo's argument is a tautological word game, assuming the answer to the question before the Court: *Is* the consumer taking something from

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[16]Nintendo asserts that it was not the private or in-home character of the consumers' copying that made it a "nonprofit" use in *Sony*, but rather that it "enable[d] a viewer to see . . . a work which he had been invited to witness in its entirety free of charge." Pet. at 20 (quoting *Sony*, 464 U.S. at 449). That misstates the *Sony* opinion. The quoted language refers specifically to the *third* statutory factor (the "amount and substantiality" of the use), *not* to the "nonprofit" determination at issue here. 464 U.S. at 449-50.

Nintendo for which it should otherwise have to pay? If Nintendo's view were the law, then *no* use could *ever* be a fair use; after all, *every* user of a copyrighted work who claims the use is fair would be obligated to pay the copyright holder if the use were found *not* to be a fair use.[17]

B. The Second Factor: The Published "Nature" Of The Video Games Supports The Fairness Of A Consumer's Transitory Enhancements Of Play In The Player's Home.

The District Court correctly analyzed this issue:

> "The second factor considers 'the nature of the copyrighted work.' 17 U.S.C. §107(2). The courts have traditionally inquired whether the work is published, with unpublished works gaining more protection. 3 NIMMER §13.05[A][2], at 13-75 to 13-79 . . . . By contrast, Nintendo has already published millions of copies of its games to anyone willing to pay the purchase price. Only after acquiring a published copy of the game may its owner use it in combination with the Game Genie. The works' published nature supports the fairness of the use." (Pet. App. B-21-22)

The Court of Appeals correctly upheld this finding (Pet. App. A-13), and Nintendo's Petition identifies no flaw in its analysis.[18]

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[17]As the Court of Appeals pointed out, Nintendo's reliance on *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985) is badly misplaced. In *Harper & Row, The Nation* magazine published and sold to the public, for profit, copies of Gerald Ford's copyrighted memoirs without the right to do so. 471 U.S. at 561-62. Obviously that use was commercial. Here, consumers that play with the Game Genie do it privately, at home, for fun; they do not sell the resulting game play to the public for commercial gain.

[18]Nintendo argued below, and hints in its Petition (at 21), that this factor weighs against fair use because Nintendo has not published the (continued...)

C. The Third Factor: Because Consumers Have The Right To Use The Games They Purchase, Their Use Of The Entire Game Does Not Weigh Against Fair Use.

The third factor in the fair use analysis is the "amount and substantiality of the portion used in relation to the copyrighted work as a whole." 17 U.S.C. §107(3). Again, the District Court's analysis of this factor was plainly correct, and again the Court of Appeals properly affirmed it:

> "Consumers are not invited to witness Nintendo's audiovisual displays free of charge, but, once they have paid to do so, the fact that the derivative works [it is assumed *arguendo* are] created by the Game Genie are comprised almost entirely of Nintendo's copyrighted displays does not militate against a finding of fair use.
>
> "Nintendo would distinguish *Sony* because it involved copying copyrighted works rather than creating derivative works based on those works. . . . It is difficult to imagine that the Court would have reached a different conclusion if

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[18](...continued)
purported "derivative works" at issue, even though it has broadly published the original games. The Court of Appeals expressly considered and properly rejected this contention, pointing out that "[t]his argument ignores the plain language of section 107" because the statute specifically requires a focus on "the nature of the *copyrighted* work," not potential derivative works. Pet. App. A-13 (emphasis in original). As the Court of Appeals observed:

> "The argument also would make the fair use defense unavailable in all cases of derivative works, including 'criticism, comment, news reporting, teaching . . . , scholarship, or research.' 17 U.S.C. §107. A commentary that incorporated large portions of *For Whom the Bell Tolls* for example, would be undeserving of fair use protection because the incorporated portions would constitute an unpublished derivative work. This cannot be the law." (*Id.*)

> Betamax purchasers were skipping portions of copyrighted works or viewing denouements before climaxes. *Sony* recognizes that a party who distributes a copyrighted work cannot dictate how that work is to be enjoyed. Consumers may use a Betamax to view copyrighted works at a more convenient time. They similarly may use a Game Genie to enhance a Nintendo game cartridge's audiovisual display in such a way as to make the experience more enjoyable."[19] (Pet. App. A-13-14)

Nintendo claims that this reasoning is somehow undermined by *Stewart v. Abend*, 495 U.S. 207 (1990), but *Stewart* never addresses the question the lower courts considered here. Nintendo sweepingly characterizes the case as having rejected the fair use defense for a "substantial taking of a creative work" (Pet. at 23), but this proves far too much: *Stewart* was a case in which the defendant had no more right to *use* the original work than to *alter* it. *See* 495 U.S. at 235-36. Here, by contrast, the purchaser of a Nintendo game has every right to display the images produced by the copyrighted game. The fact that the consumer does so when playing with a Game Genie as

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[19]The District Court had reasoned:

> "Again, the *Sony* decision is dispositive. *Sony* recognized that the reproduction of an entire work ordinarily weighs against the claim of fair use. 464 U.S. at 450. In *Sony*, however, because the VCR owner "had been invited to witness [the television program] in its entirety free of charge, the fact that the entire work is reproduced does not have its ordinary effect of militating against a finding of fair use." *Id.* at 449. Likewise, in this action a game owner who has fairly acquired a Nintendo game has a right to use the entire work. The game owner's rights are equal to, if not greater than, those of the user in *Sony*, who did not pay for the product being used. Because the game owner is entitled to use the entire work, no matter what the 'amount and substantiality' of his use, the third factor cannot assist Nintendo in overcoming the presumption of fair use." (Pet. App. B-22)

much as when playing without one does not make the use unfair.

D. The Fourth Factor: Nintendo Did Not Carry Its Burden Of Proving Harm To The Market For The Copyrighted Work.

The last and "undoubtedly the single most important" factor (*Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985)) is the "effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. §107(4). To defeat fair use under this factor "requires proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work." *Sony*, 464 U.S. at 451. As the Court of Appeals correctly held (Pet. App. A-15), because consumers use the Game Genie for a non-commercial purpose, Nintendo had the burden of proving "that *some* meaningful likelihood of future harm exists." *Sony*, 464 U.S. at 451 (emphasis in original). The District Court and the Court of Appeals both held that Nintendo failed to meet that burden on the facts presented at trial.

In this Court, Nintendo claims that the Game Genie impairs the potential market for derivative versions of its games that would be comparable to those "that are created by the Game Genie itself."[20] Pet. at 19. The Court of Appeals accepted Nintendo's *legal* position that "the test for market harm encompasses the potential market for

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[20]At trial, Nintendo focused on an entirely different injury, claiming that the Game Genie would diminish the demand for its existing copyrighted works. The District Court carefully analyzed Nintendo's claim based on the evidence presented at trial, and found that it "had failed to prove an adverse effect on the relevant market for the copyrighted works at issue." Pet. App. B-25; *see id.* at B-25-29. Nintendo did not challenge that finding in the Court of Appeals, nor has it done so in its Petition here.

derivative works."[21] Pet. App. A-14-15. It found,

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[21]Nintendo insists on focusing on the market for the *Game Genie*, rather than the market for *new versions of existing games* as the law requires. The difference is critical. Nintendo relies on the bald assumption that, because consumers want to buy the Game Genie, the Game Genie *must* interfere with a market over which Nintendo has a right of monopoly control. In addition to assuming its conclusion once again, Nintendo has simply ignored what market is at issue. While Nintendo may wish to argue (incorrectly, for the reasons discussed above) that *each enhanced play of its games* achieved with the Game Genie is a separate "derivative work," *the Game Genie itself* is *not* a derivative work of *anything*. It neither incorporates nor copies *any* Nintendo software, images or sounds whatsoever; nor can *the Game Genie itself* possibly be characterized as a new or altered version of any Nintendo game.

The Game Genie is nothing more than a hardware tool that consumers may use with their games to create the transitory effects of which Nintendo complains. It is no more "derivative" of the games with which it works than a VCR with slow-motion is "derivative" of the film whose display a viewer uses that VCR to alter. *See Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255, 267-68 (5th Cir. 1988) (computer program that did not contain substantial amounts of plaintiff's copyrighted expression, but worked together with plaintiff's copyrighted software to achieve a result to which plaintiff objected, did not infringe plaintiff's work). And the fact that there is a market for a separate tool like the Game Genie that works independently with *all games* certainly does not prove that there is a "different market" for a different version of *one game* with a few of the changes the Game Genie permits in that one game, any more than the fact that there is a market for VCRs with a slow-motion feature proves that there is a market for a different version of an existing film that exhibits all or part of that film in slow motion. The Court of Appeals understood and articulated this point vividly:

> "[T]he existence of a market does not, and cannot, determine conclusively whether a work is an infringing derivative work. For example, although there is a market for kaleidoscopes, it does not necessarily follow that kaleidoscopes create unlawful derivative works when pointed at protected artwork. The same can be said of countless other products that enhance, but do not replace, copyrighted works." (Pet. App. A-7-8)

For these reasons, Nintendo's statement (unaccompanied by any citation to the record) that "[t]he harm caused by the [Game Genie's] supplantation of this derivative works market (which Galoob itself estimates to have a value of $150 million in 1990 and 1991 alone) is beyond dispute"

(continued...)

however, that

> "*Nintendo's argument is undermined by the facts.* The district court considered the potential market for derivative works based on Nintendo game cartridges and found that (1) 'Nintendo has not, to date, issued or considered issuing altered versions of existing games' and (2) Nintendo 'has failed to show the reasonable likelihood of such a market.' The record supports the court's findings." (Pet. App. A-15-16 (emphasis added; citations omitted))[22]

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[21](...continued)
(Pet. at 19-20) is not only false but preposterous. The Game Genie does not "supplant[]" *any* "derivative works market"; the lower courts expressly found otherwise on the facts presented at trial. The fact that consumers want to buy *the Game Genie* (which is not "derivative" of *any* work copyrighted by Nintendo) does not automatically entitle Nintendo to the proceeds.

[22]The District Court's factual findings on this issue, based on substantial documentary evidence and expert testimony, are as follows:

> "Nintendo also seeks relief for harm that may occur in the future, on the grounds that the Game Genie may decrease demand for sequels or slightly altered versions of Nintendo games. Nintendo has not, to date, issued or considered issuing altered versions of existing games. Nintendo argues, however, that should such a market develop within the copyright period, it is entitled to decide if such games are appropriate and to reap the resulting revenues. In theory, Nintendo is correct; ***however, it has failed to show the reasonable likelihood of such a market.*** Nintendo's video games are expensive toys; each retails in the $40 to $50 range. ***There is neither evidence nor reason to believe that a consumer who owns the original game would invest a similar amount in a slight variation thereof.***
>
> "In addition, Nintendo's assertion that it may wish to re-release altered versions of the games in suit 10, 20 or 30 years from now (much as Parker Brothers recently did with "Monopoly") is at odds with the position taken by Nintendo in various other lawsuits pending before this Court. In those actions, Nintendo opposes antitrust claims by using the vagaries of the video game industry to rebut the impact and
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> (continued...)

What Nintendo seeks here is review of the concurrent findings of both the District Court and the Court of Appeals on that factual question. But this Court, as a "court of law, . . . rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949) and cases cited; *accord, Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987); *Rogers v. Lodge*, 458 U.S. 613, 623 (1982); *Berenyi v. District Director, INS*, 385 U.S. 630, 635 (1967); R. STERN, E. GRESSMAN & S. SHAPIRO, SUPREME COURT PRACTICE 218 (6th ed. 1986). The Court of Appeals' affirmance of the District Court's finding on this fourth fair use factor raises no issue appropriate for review here.

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[22](...continued)
permanence of its market control, if any. Having indoctrinated this Court as to the fast pace and instability of the video game industry, Nintendo may not now, without any data, redefine that market in its request for the extraordinary remedy sought herein. ***Nintendo has failed to show any harm to the present market for its copyrighted games and has failed to establish the reasonable likelihood of a potential market for slightly altered versions of the games at suit.*** While good board games may never die, good video games are mortal." (Pet. App. B-26 (emphasis added))

CONCLUSION

For each of these reasons, as well as the reasons not reached by the lower courts set out in footnote 2 above, the Petition For Certiorari should be denied.

DATED: February 26, 1993.

Respectfully,

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